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*Interim Counsel for the Consumer Class*

**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION**

MAXIMILIAN KLEIN, SARAH GRABERT,  
and RACHEL BANKS KUPCHO, on behalf  
of themselves and all others similarly situated,

*Plaintiffs,*

vs.

FACEBOOK, INC.,

*Defendant.*

Consolidated Case No. 5:20-cv-08570-LHK

**DECLARATION OF WARREN  
POSTMAN IN SUPPORT OF  
PLAINTIFFS' OPPOSITION TO  
FACEBOOK'S MOTION TO  
DISQUALIFY KELLER LENKNER LLC**

Hon. Lucy H. Koh  
Date: September 30, 2021  
Time: 1:30 p.m.  
Courtroom: 8

This Document Relates To: All Actions

1 I, Warren Postman, declare as follows:

2 1. I am a Partner at Keller Lenkner LLC (“KL”). I have personal knowledge of the  
3 facts stated herein, and, if called upon as a witness, I could and would competently testify thereto.

4 **Background on Keller Lenkner**

5 2. KL represents plaintiffs in complex litigation, with a focus on product liability,  
6 consumer protection, employment law, and antitrust claims. At KL, the process of identifying  
7 potential cases often begins with KL partners following the news; reading legal publications such  
8 as Law360, National Law Journal, and Westlaw Today; and reviewing docket alerts for certain types  
9 of case filings. Other law firms also contact us regularly to suggest potential opportunities to work  
10 as co-counsel. When those sources elicit an idea for a potential case, we often undertake research  
11 on Westlaw or PACER to better understand the issue. If the initial research is encouraging, we  
12 discuss the idea with a fellow partner or two. If the idea still seems to have promise, we conduct  
13 more thorough research and discuss the idea with additional partners before deciding whether to  
14 proceed. This cycle of discussion and research is often iterative. Once the firm decides to pursue a  
15 case, we seek out a client—often through online marketing—to retain us to pursue the claims.

16 3. I typically spend several hours each weekend and several more hours over the course  
17 of each work week on the process above. In an average week, I skim hundreds of news stories about  
18 potential defendants, perform quick research into a dozen or more potential cases, and discuss  
19 several potential case ideas with my partners. KL decides to pursue only a very small number of  
20 the cases we explore.

21 **Keller Lenkner Consideration of Antitrust Claims Against Facebook**

22 4. Starting in early 2020, I began reading public news reports that made clear the  
23 Federal Trade Commission and other regulators were increasingly concerned about antitrust harms  
24 caused by “big tech” companies such as Amazon, Google, Apple, and Facebook.

25 5. In late July, the House Judiciary Committee conducted widely publicized hearings  
26 regarding big tech companies and antitrust, which included testimony from the CEOs of Amazon,  
27 Google, Apple, and Facebook. On August 4, 2020, Ashley Keller, Travis Lenkner, Adam Gerchen,  
28 and I conducted a quarterly planning meeting and discussed the firm’s strategic priorities for new

1 cases. We noted the growing public recognition that big tech companies cause antitrust harms and  
2 agreed to prioritize antitrust matters against those companies. In the following weeks, Mr. Keller  
3 and I brainstormed multiple ideas for antitrust cases against each of these companies, including  
4 Facebook. With regard to Facebook, we soon included our partner, Ben Whiting, in the discussions.

5         6.       On October 4, 2020, the Subcommittee on Antitrust, Commercial and Administrative  
6 Law of the House Judiciary Committee released a report entitled “Investigation of Competition in  
7 Digital Markets” that detailed a wide range of anticompetitive conduct and harms committed by  
8 Facebook. Mr. Keller, Mr. Whiting, and I thought we had come up with some insights that were  
9 not fully captured by the Subcommittee Report and resolved to think through the relevant legal and  
10 factual issues more thoroughly. KL also decided that, for a variety of strategic reasons, we would  
11 want to partner with another, larger firm before deciding to file a major antitrust case against  
12 Facebook.

13         7.       On October 14, 2020, I called Stephen Swedlow at Quinn Emanuel (“QE”) to raise  
14 the possibility of KL’s partnering with QE to bring an antitrust case against Facebook. KL and QE  
15 have worked successfully as co-counsel on several other cases in the past.

16         8.       Mr. Swedlow informed me that QE had in fact litigated a related case against  
17 Facebook in 2019 and spent a considerable amount of time since then investigating similar antitrust  
18 theories to the ones KL had proposed pursuing. We continued to discuss the possibility of a potential  
19 case over the following several weeks.

20         9.       KL and QE formally agreed to pursue a case against Facebook together on November  
21 20, 2020.

22         10.      On November 22, 2020, KL began searching for a client interested in retaining KL  
23 and QE.

24         11.      Maximillian Klein and Sarah Grabert retained KL and QE on December 3, 2020.

25         **Screening of Albert Pak**

26         12.      Albert Pak joined KL as an associate in KL’s Washington, D.C. office on June 29,  
27 2020.

1           13.     On June 30, 2020, I asked Mr. Pak to describe for conflict purposes the former clients  
2 he had represented at Kellogg, Hansen, Todd, Figel & Frederick P.L.L.C. (“Kellogg Hansen”) and,  
3 as KL does for all incoming attorneys, I asked Mr. Pak to obtain a full conflicts list from his former  
4 firm. Mr. Pak disclosed that he had performed work for Facebook while at Kellogg Hansen.  
5 Kellogg Hansen is known for its work in antitrust matters, Facebook was under scrutiny for potential  
6 antitrust violations, and KL regularly brings antitrust claims on behalf of plaintiffs. I therefore asked  
7 Mr. Pak if the work he performed for Facebook was antitrust-related. When Mr. Pak replied that it  
8 was, I made a mental note to avoid involving Mr. Pak in anything related to Facebook and antitrust  
9 in the future. At that time, however, KL did not represent any client adverse to Facebook and had  
10 no concrete plans to bring any case against Facebook.

11           14.     Mr. Pak forwarded me a full conflicts list from Kellogg Hansen on July 1, 2020,  
12 which I shared with KL’s Managing Partner, Travis Lenkner.

13           15.     In early August, when I first began discussing potential claims against Facebook with  
14 Mr. Keller and Mr. Whiting, I immediately instructed them not to discuss the claims with Mr. Pak,  
15 because he had previously represented Facebook while at Kellogg Hansen. Mr. Keller, Mr. Whiting,  
16 and I analyzed and discussed potential claims by email and primarily stored related files locally on  
17 our hard drives, none of which could be accessed by Mr. Pak. Prior to November 11, 2020, a single  
18 file relating to this case was stored on our cloud-based document management system, and our  
19 access records confirm that Mr. Pak never accessed it.

20           16.     As we began investigating potential claims against Facebook, I also asked Mr. Pak  
21 to describe in further detail, without revealing confidential information, the sort of antitrust matter  
22 in which he had represented Facebook and the nature of his role in that matter. I explained that KL  
23 was evaluating potential antitrust claims against Facebook on behalf of Facebook users and asked  
24 if his work for Facebook was related to those issues. Mr. Pak told me that the matter involved a  
25 large antitrust investigation and that it likely was related to such issues. He also explained that he  
26 was one of many lawyers at Kellogg Hansen and several other firms who had represented the  
27 company in the matter. He said that he played a junior role on a large team of Kellogg Hansen  
28 lawyers, which was focused primarily on investigating potential experts, and that he had worked on

1 the matter for several months (he likely told me a precise number of months, but I do not specifically  
 2 recall it). At that time, KL still had not decided to pursue an antitrust case against Facebook, or  
 3 where such a case might be filed. Out of an abundance of caution, however, I instructed Mr. Pak to  
 4 be careful not to discuss any claims involving Facebook with anyone at KL.

5 17. By November 11, 2020, it seemed likely that KL and QE would reach an agreement  
 6 to work together to file an antitrust case against Facebook on behalf of Facebook users. I therefore  
 7 suggested to Mr. Lenkner that we institute a formal, firmwide ethical screen. Mr. Lenkner imposed  
 8 the following screening measures:

- 9 • That same day, Mr. Lenkner notified all KL attorneys and staff by email, marked  
 10 “high priority,” that Mr. Pak had been screened from—and could not have any  
 11 involvement in—the potential antitrust case KL was considering pursuing against  
 12 Facebook.
- 13 • All attorneys and staff were further directed not to:
  - 14 ○ Speak to Mr. Pak about the potential case or any related issues;
  - 15 ○ Save any Facebook-related files outside of the Facebook workspace on the  
 16 document management system; or
  - 17 ○ Leave physical case materials in unlocked or open areas that could be  
 18 accessed by anyone not working on the matter.
- 19 • Also on November 11, 2020, access to all documents related to Facebook was  
 20 restricted to exclude Mr. Pak.
- 21 • During a quarterly all-firm meeting conducted via Zoom on December 4, 2020, all  
 22 KL attorneys and staff were reminded of this (and other) ethical screens in place at  
 23 the firm and the attendant restrictions.
- 24 • All attorneys and staff who join KL are informed of this (and other) ethical screens  
 25 in place at the firm and the attendant restrictions.
- 26 • The main KL “intranet” page for attorneys and staff lists current ethical screens in  
 27 place at the firm, including this one.

1           18. As noted above, I discussed the contours of Mr. Pak's work for Facebook only to the  
2 extent necessary to evaluate the potential for a conflict. I have never discussed the substance of Mr.  
3 Pak's work with Facebook with Mr. Pak. I have never discussed the claims in this case with Mr.  
4 Pak. And Mr. Pak has never discussed the claims in this case with me.

5           19. Every attorney at KL who has billed time to this case has submitted a declaration in  
6 support of KL's opposition to Facebook's motion to disqualify confirming that he or she similarly  
7 has never discussed this case, or Mr. Pak's work for Facebook, with Mr. Pak.

8           20. At the hearing before this Court on March 19, 2021, I stated that Mr. Pak had been  
9 screened "upon his arrival at the firm." That was admittedly an imprecise description. As noted,  
10 when Mr. Pak arrived at the firm on June 29, 2020, KL did not have any client adverse to Facebook  
11 and had no plans to have any matter adverse to Facebook, so there was nothing from which to screen  
12 Mr. Pak. What I should have said was that we conducted a conflicts check upon Mr. Pak's arrival  
13 at the firm, that we were therefore aware that he had previously represented Facebook, and that as  
14 a result, we ensured at every step that Mr. Pak had no involvement in the Facebook case in any way.  
15 In other words, from the moment Mr. Pak joined the firm and we performed a standard conflicts  
16 check, and we took all appropriate steps to ensure a proper screen.

17           **Practical Implications of Facebook's Position**

18           21. Facebook has taken the position that KL should have "screened" Mr. Pak  
19 immediately upon his joining KL, or at least when KL first thought about potential claims against  
20 Facebook. A requirement to screen lawyers from potential, non-existent, future matters would be  
21 entirely unworkable for any law firm..

22           22. In any given week, lawyers at KL likely discuss more than a dozen potential new  
23 case ideas. Many of these ideas give rise to some preliminary research questions. And several each  
24 month lead to detailed analyses but ultimately are not pursued. If KL were required to impose a  
25 formal, firm-wide screen for every one of every KL lawyer's former clients, regardless of whether  
26 KL was even considering pursuing a matter against a lawyer's former clients, it would be impossible  
27 to comply because we would not know what to screen the lawyer *from*. Moreover, if KL were  
28 required to impose a formal firmwide screen as soon as any lawyer at KL had an idea for a potential

1 case, KL would be forced to send out hundreds of screens each year. That would make it impossible  
2 for attorneys at KL to remember all the screens in place, and to whom they applied, and ultimately  
3 would make the screens that *are* required by the rules less effective.

4  
5 I declare that the foregoing is true and correct under penalty of perjury. Executed May 21, 2021, in  
6 Burlington, Vermont.

7  
8 /s/ Warren Postman  
Warren Postman